Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MARTIN MEYER WEISS,

Petitioner

v.

MARSHA NADEEN WEISS,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

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PETITION FOR A WRIT OF CERTIORARI

Martin M. Weiss, M.D.
In Pro Per
6345 Daylight Drive
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Petitioner

72 pp

QUESTIONS PRESENTED

1. Whether the imposition of contributory attorney fees against the separate private property of a party in a divorce proceeding, under California Family Code §2030, violates the free exercise of religion provision of the First Amendment, and the Religious Freedom Restoration Act, when the only contested issue between the parties was the religious upbringing and identity of the child of the marriage, and where the party awarded the fees had feigned a conversion to the religion of the first party, to induce the marriage.

2. Whether the seizure of separate private property by the State of California, under California Family Code §2030, from one party in a divorce, for transfer to the opposing party, to finance and advance the litigation efforts of the latter against the former, violates the 5th and 14th amendments as a taking, when under no-fault divorce, the party whose property is seized by the state, is guilty, under law, of no wrong doing.

3. Whether the seizure, under California Family Code §2030, by the State of California, of the separate private property of one party in a divorce, for the sole purpose of transferring that property to the opposing party, to promote the litigation efforts of the latter to frustrate and defeat the legal efforts of the former to exercise a most fundamental right, i.e., the right to direct the upbringing of one's child, thwarts or has an otherwise impermissible chilling effect on the attempt to exercise that fundamental right; or is such seizure by the state a legitimate exercise of its police power.

4. Whether the imposition of contributory attorney fees by the State of California, under California Family Code §2030, is a legitimate exercise of the police power of the state to "level the playing field" in divorce, or is the exercise of that power intended to discourage fathers from seeking custody of their children, and therefore an impermissible gender based denial of the equal protection and due process clauses of the 14th Amendment.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding before the Court of Appeal of the State of California:

1. Martin Meyer Weiss, Petitioner in the Trial Court, Appellant in the Court of Appeal for the Second Appellate District of the State of California, and Petitioner in this Court.

2. Marsha Nadeen Weiss, Respondent in the Trial Court, Defendant in the Court of Appeal for the Second Appellate District of the State of California, and Respondent in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF ALL PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES iv

Cases iv

Constitutions and Statutes v

Treatises and Articles.....vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE 3

ARGUMENT AND AUTHORITY..... 8

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Bennis v. Michigan , 134 L.Ed.2d 68, 116 S.Ct. 994 (1996) .. 22

Bently v. Bently, 448 N.Y.S.2d 559..... 11

In re Marriage of Burgess, 13 Cal.4th 25 25

Commonwealth ex. rel Jordan v. Jordan,
302 Pa.Super 421, 448 A2d 113 26

Frost v. Los Angeles, 181 Cal. 22, 183 P 342 19

Funk v. Ossman, 724 P.2d 1247..... 11

Heim v. Heim 394 N.W.2d 254 28

Hopkins v. Detrick, 97 CA2d 50, 58 25

Garska v. McCoy, 278 S.E. 2d 357, 362 ..... 25, 26, 27

Marriage of Jafeman, 29 Cal.App 3d 244, 268 13

Marriage of Skelly, 18 Cal.3d 368 14

Marriage of Reese 73 CA3d 120, 140 CR 589 9

McCabe v. McCabe 430 N.W.2d 870 28

Meagher v. Meagher, 190 CA2d 62, 11CR 650 9

Michael H. v. Gerald D., 109 S.Ct.2333 20

Pacific Tel. & Tel. Co. v. Eshleman, 166 Ca 640, 137 P 1119.. 19

Pencovic v. Pencovic, 45 C2d 97, 287 P2d 501 9

TABLE OF AUTHORITIES - Continued

Philbin v. Philbin, 190 CA2d 62, 11 CR 650..... 9

Pierce v. Society of Sisters, 268 US 510..... 20

Pikula v. Pikula, 374 N.W.2d 705 25

Rose v. State, 19 Cal.2d 713, 123 P2d 505 19

Smith v. Regents of the University of California,
4 Cal.4th; 16 Cal.Rptr.2d 181; 844 P.2d 500 21

Saint-Pierre v. Saint Pierre, 357 N.W.2d 250 28

Thompson v. Thompson, 511 N.E.2d 412 26

United States v. Virginia, 64 LW 4643 29

Wood v. Hamaguchi, 207 Cal 79, 277 P113,
63 ALR 861..... 21

Zummo v. Zummo, 574 A2d 1146 ..... 7, 12, 13

CONSTITUTIONS AND STATUTES

U.S. Const. , Amend .1 ..... 3, 8, 16, 17

U.S. Const., Amend. V 3, 17,
20

U.S. Const., Amend.. XIV 3, 17, 20

42 U.S.C.A. §2000bb-1 ..... 3, 8, 16, 17

California Family Code § 2030
(formerly Civil Code §4370) 4, 15, 17, 18, 20

TABLE OF AUTHORITIES - Continued

California Family Code §274
(formerly Civil Code §4370.6) 18

California Family Code §2335
(formerly Civil Code §4509) 24

California Code of Civil Procedure §904.1 15

TREATISES AND ARTICLES

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16A Am Jur 2d §365, §369, §370 ..... 19, 21

Areen, J., *Family Law: Cases and Materials*, 664 (1992)..... 25

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Kirkland,K, Lurvey, I, Richmond, D., *California Family Practice and Procedure*, Vol.2, §62.08, Matthew Bender 1996 13

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Representing Clients in Spousal and Child Support Matters, CEB, 1991 9

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Weiss, M.M., *The Enforceability of Religious Upbringing Agreements*, The John Marshall Law Review, Vol 25, Summer 1992, pages 655-725 13

Weitzman, L., *The Economic Consequences of Divorce*, 8 Family Law Reporter 4038, August 3, 1982 23

OPINIONS AND ORDERS BELOW

The following orders and opinions have been entered by the Courts below:

1. Interlocutory Order Granting Respondent's Motion for Pendente Lite Contributory Attorney Fees, entered by the Superior Court of the County of Los Angeles, Northwest District, in case number NWD 119894, on July 29, 1991. (App. 3-1).

2. Interlocutory Order Granting Respondent's Motion for Additional Pendente Lite Contributory Attorney Fees, entered by the Superior Court of the County of Los Angeles, Northwest District, Case Number NWD 119894, on Nov. 5, 1992. (App. 4-1).

3. Judgment on Issue of Custody, entered by the Superior Court of the County of Los Angeles, Northwest District, in Case Number NWD 119894, on August 4, 1993. (App. 5-1).

4. Opinion of the Court of Appeals for the Second Appellate District of the State of California, in Case Number B083168, on January 31, 1996, reported at 49 Cal.Rptr.2d 339. (App. 1-1).

5. Petition for Review in the Supreme Court of the State of California Denied, Case Number B083168, May1,1996. (App.2-1).

JURISDICTION

Petitioner seeks review of the actions of the Court of Appeal of the State of California, Second Appellate District, Division Three. The Court of Appeal entered its opinion on January 31, 1996. The Supreme Court of the State of California denied Petition for Review on May 1, 1996. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (1).

This Petition was filed within ninety (90) days of the denial by the Supreme Court of the State of California of the Petitioner's Petition for Review. The validity of a statute of the State of California is drawn in question in this case on the ground of its being repugnant to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of constitutional and statutory provisions involved in this case are as follows:

1. First Amendment to the United States Constitution:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fifth Amendment to the United States Constitution:
.....nor shall private property be taken for public use, without just compensation.

3. Section 1 of the Fourteenth Amendment to the United States Constitution:
.....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C.A. 2000bb-1, Religious Freedom Restoration Act:
Free exercise of religion protected.
(a) In General:
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in the furtherance of compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

5. California Family Code § 2030:
(a) During the pendency of a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of the parties rights, order any party, except a governmental entity, to pay the amount reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding....

STATEMENT OF THE CASE

This case involves a divorce in which the petitioner/father sought recognition by the court of a prenuptial religious upbringing agreement. Baring recognition of the agreement by the court, the petitioner sought restrictions placed on the mother's indoctrination of the child, based on the best interests of the child, as defined by the recommendations of the neutral, court appointed psychiatrist, who advised limitations, and based on the likelihood of emotional and mental harm to the child from being indoctrinated into a second conflicting religion.

The mother/respondent argued that she did not violate the pre-nuptial agreement, stating that Messianic Judaism (Jews for Jesus) is a branch of Judaism, and that she had a First Amendment right to involve the child in her religious beliefs and practices, "up to heinous harm". It was revealed at trial that the respondent feigned her conversion to Judaism, to induce the marriage.

The trial court refused to enjoin the mother from any religious activity with the child. The petitioner appealed, on the religious upbringing issue, and on the award of contributory attorney fees from his separate property, which he claimed were an abuse of discretion in violating California statutory and case law in the amount assessed, and which he claimed violated his First Amendment free exercise of religion rights, and 5th and 14th Amendment rights regarding the taking of his private property by

the State. The petitioner claimed the imposition of contributory attorney fees thwarted the presentation of his case.

The Appellate court upheld the decision of the trial court commissioner, establishing a new rule that prenuptial religious upbringing agreements are to be held uniformly unenforceable, and that a parent will not be enjoined from involving a child in religious activities absent a clear affirmative showing of harm. The Appellate court refused to consider the issue of contributory attorney fees, holding that appeal on this matter was untimely.

Petition for Review to the Supreme Court of the State of California was denied. Petitioner now appeals to the Supreme Court of the United States.

Procedures Below

The parties were married in 1984. Martin, the petitioner, is Jewish. One month prior to the marriage, Marsha, the respondent, converted to Judaism from the Christian faith. It was subsequently revealed at trial that the respondent feigned her conversion to Judaism (RT, p244). At the time of her purported conversion, she executed a "Declaration of Faith", witnessed by three rabbis, "pledg(ing) to rear all (their) children...in loyalty to the Jewish faith and its practices". (RT, 8/28/92, p212, and RT, 8/28/92, at p242 to 244, and exhibit 2, at trial). Martin relied upon this promise when he married Marsha.(RT, p49). The parties have a son, Matthew, born in 1985.

Martin filed for dissolution of marriage, in November 1989, after Marsha, contrary to her commitments, began to raise their child in a fundamentalist Christian religion. (CT V1, p8). The case was filed in Van Nuys Superior Court, in Los Angeles, California.

Marsha, on September 11, 1990, requested of the court an order, for a psychological evaluation of the child, "to determine, what is in fact, in his best interest". (CT p14). The court ordered psychiatric examination, by a neutral psychiatric evaluator, was

filed with the court in July of 1991. That examination stated that the child be raised in the Jewish faith until completion of his Bar Mitzvah, with the respondent (mother) allowed to take the minor child to church only occasionally. (CT V.2 p241, line 8).

On July 29, 1991, the trial court entered a contributory attorney fee order directing Martin to pay directly to Marsha's attorney, $10,000, (RT, 6/26/91, p24), as an advance, without prejudice, for a contributive share of her attorney fees and costs, with the final amount to be determined at the time of trial. (CT, p117). Also on that date (July 29, 1991), the trial court commissioner ordered Martin to pay Marsha, who continued after the order to reside with Martin, $8,750 in retroactive spousal support, and $2,780 per month in ongoing monthly spousal support, (RT 6/26/91, p22); with all the above sums to be payable in one lump sum, within two weeks of the order. (CT, V1, p115-117).

Directly following, and as a direct consequence of the financial orders of 6/26/91 by the trial court commissioner, Martin was without legal representation, and was left in pro-persona. (RT 8/27/92, p150, line 15, CT p118). Martin's brother subsequently hired and financed an attorney for Martin. (RT 8/28/92, p269).

On August 25, 1992, judgment of dissolution as to status only was entered, reserving jurisdiction over remaining issues, including custody. (CT p225).

On August 25 through 28, 1992, the bifurcated issues of the minor's custody were litigated. The only custody dispute was the religious upbringing of the child. Both parents testified. Marsha was now attending Calvary Church. She had enrolled the minor in Sunday school at the church. In addition, the minor child had attended a club meeting at the church on Wednesday evenings and had gone to the church camp the previous summer. Martin acknowledged Marsha had the right to expose the minor child to her religion, but objected to the minor's being indoctrinated in the Christian faith or being enrolled in any activity "that would be contrary to his Jewish faith". (Appendix 1-3). Martin

sought these restrictions based on the antenuptial agreement the respondent had signed, and based on the best interests of the child, as determined and recommended by the neutral court ordered psychiatrist, Martin did testify that the child had cried, being subjected to two different religions. (RT p65).

On November 5, 1992, the trial court ordered Martin to pay an additional $12,000 of Marsha's attorney fees and costs. (CT p293).

On August 4, 1993, the trial court issued its further judgment on the reserved issue of custody. The Court awarded joint physical and legal custody of the minor and also stated that "(Other than permitting petitioner to enroll the child in an after school Hebrew program twice a week regardless of custody schedule), nothing in this Order is deemed to prevent either party from enrolling the child in or having the child participate in other religious programs or activities during their respective custodial time." (App. 5-4).

On June 2, 1993, the trial court ruled that the attorney representing the appellant (Martin), had failed to exercise diligence, in neglecting to file a proposed statement of decision for over seven months. (RT, Augment to Transcript on Appeal, June 2, 1993, filed Oct. 25, 1994, p8).

On October 1, 1993, Martin filed notice of appeal from the August 4, 1993 further judgment on reserved issues. (CT p327). The notice of appeal also specified the trial court's July 29, 1991 and November 5, 1992 orders for contributory attorney fees.

On appeal, the petitioner sought enforcement of the recommendations of the court ordered psychiatrist, citing the pre-nuptial religious upbringing agreement, and the best interests of the child. The respondent argued that she had a religious freedom right, under the First Amendment and the Religious Freedom Restoration Act, to take the child up to "markedly heinous harm" (Respondent's Appellate Brief, page 16, line 6). The petitioner also appealed the imposition of contributory attorney fees against his separate property, arguing there was an abuse of discretion in

violating statutory law, and in violating well-established case law. The petitioner, in his appeal, did not request return of the contributory attorney awards, but only recognition that the imposition of those fees thwarted his presentation of his case, left him without access to legal representation on critical issues, and had a prejudicial effect on the outcome of the trial. The petitioner also argued that the imposition of contributory attorney fees, in the context of no-fault divorce, met not a single criteria for the exercise of police power, and violated the 5th and 14th amendments, and represented a taking, thwarting the exercise of a fundamental right, the right to direct the upbringing of one's child. The petitioner also argued that the imposition of contributory attorney fees against him, of which the only substantial purpose of those fees was to obtain the legal sanctioning of the taking of his child into another religion, represented a violation of his free exercise of religion rights under the First Amendment.

On January 12, 1994, trial was held on financial issues. The petitioner was ordered to pay directly to respondent's attorney an additional $5,000. (App. 6-1).

On January 31, 1996, the Second Appellate District, Division Three, State of California, filed its opinion. which it certified for publication. (App. 1-1). The court established a new rule that written antenuptial commitments on the religious upbringing of children, as a matter of law, are not legally enforceable. The court also ruled, relying on *Zummo v. Zummo*, 574 A2d 1146, that a clear affirmative showing that the child would be harmed by conflicting religious upbringing, rather than a likelihood of harm, would be required before a court could impose a religious upbringing restriction on a parent. The court further ruled that Martin's appeal from the attorney fee awards was untimely.

Martin filed a Petition for Review with the California Supreme Court on March 8, 1996. which was denied on May 1, 1996.

ARGUMENT AND AUTHORITY

The respondent's attorney, in closing argument at trial, stated that "This...case...brings with it probably some of the most fundamental issues regarding custody." (RT, page 285). The Appellate Court noted the constitutional dimensions of the issues raised in this case, (App. 1-12), and noted , as well, that the issues in the present case are a "troubling area of law". (Appendix 1-11 note 4).

Both were referring to the religious upbringing dispute. This issue is certainly of interest. A similar dispute was the subject matter of an ABC Nightline Report with Ted Koppel, in 1988 and the issue has been a front page story in the New York Times. (N.Y Times, Dec 11, 1988, at A1). Nor are such disputes rare. There are over 750,000 children in this country of Jewish-Christian intermarriage alone. (*Id.*).

However, the questions of whether prenuptial religious upbringing agreements are enforceable, and the questions of what is the appropriate threshold of harm to a child before a court may impose a restriction on a parent, pale in comparison to issue of contributory attorney fees in divorce. As will be argued below, such seizure of separate property by the state from one party, for transfer to finance the legal campaign of the opposing party, certainly impacts, likely discourages, and often precludes fathers from attempting to exert their right to contest for custody of their children. The legal justification for such a seizure, under no-fault divorce, adversely impacting the exercise of fundamental rights, warrants scrutiny. And in the particulars of the case before the court, such involuntary forfeiture in which the sole significant issue was a religious upbringing dispute, (there was no other custody dispute), violated the First Amendment free exercise of religion rights of the petitioner, and further violated his rights under the Religious Freedom Restoration Act .

a. The Amount of Contributory Attorney Fees Assessed Against the Petitioner was an Abuse of Discretion.

The imposition of $22,000 in contributory attorney fees was an abuse of discretion, under California law. The trial court commissioner attributed to the petitioner the ability to earn an income of $137, 688 per year, and based her contributory attorney fee award, and support awards, on that figure. In fact, the petitioner had never earned more than $95,000 per year. California case law demands that such awards be based on current earnings, and not earning ability, unless the spouse has intentionally reduced his income in order to diminish or eliminate a support obligation. *Pencovic v Pencovic*, (1955) 45 C2d 97, 287 P2d 501; *Marriage of Reese* (1977) 73 CA3d 120, 140 CR 589; *Philbin v. Philbin* (1971) 19 CA3d 115, 96 CR 408; *Meagher. Meagher* (1961) 190 CA2d 62, 11 CR 650. As was stated in *Philbin*, "the supported spouse has the burden of showing that the payor or spouse has deliberately reduced his income before ability to earn may be considered." *Philbin, supra*, in *Representing Clients in Spousal and Child Support Matters*, CEB, 1991, page 64. (emphasis added).

There was absolutely no demand by the trial court commissioner that the respondent provide any evidence that the petitioner was reducing his income. In fact, contrary to deliberately reducing his income, the petitioner's earnings had risen during each year of marriage, and his earned income at the time of separation, and trial, was the highest in his work history, (CT 112, CT 177, line 19), and his income at trial was the median income for a salaried physician in his specialty.

While the trial court commissioner found that the petitioner had an ability to earn $137,688 per year, it found that the respondent had an ability to earn only $6,720 per year, making a finding that she was disabled. (RT 6/26/91). Remarkably, however, no evidence or even claim of disability was presented by the respondent for any disability, either in testimony, or pleadings, or filings. The suspension of all burdens of proof on the respondent by the trial court commissioner was an abuse of discretion.

The sudden taking of over $20,000 from the separate property of the petitioner, to the respondent, for contributory attorney fees, and for retroactive spousal support (RT, 6/26/91, p24, 22, and 26), deprived the petitioner of the funds for paying his own legal representation. Without funds, the petitioner's attorney withdrew from the case, and the petitioner was left representing himself in propria-persona. (CT C1, page 118; RT, 8/27/92, page 150).

Representing oneself was not a viable option for the petitioner. The petitioner was not an attorney, nor did he have any legal education. Moreover, the petitioner was opposed by the respondent's attorney. Trial was in Van Nuys Courthouse, in the San Fernando Valley, Los Angeles County, California. The respondent's attorney was President of the San Fernando Valley Bar Association at the time of trial. (President's Message, San Fernando Valley Bar Bulletin, Issue #1-93). The petitioner has since learned that respondent's attorney, at the time of trial, was also ultimately responsible for the Judge Pro-Tem program at that courthouse.(San Fernando Valley Bar Bulletin, Issue #1-93, page 4, column 2). As a consequence of the attorney fee order, the petitioner had no money to hire a new lawyer, let alone have money to appeal the attorney fee order of the Judge Pro-Tem.

The petitioner's brother eventually chose and hired an attorney for the petitioner, and the petitioner's brother received all billings and made all the payments. (RT, 8/27/92, page 150, line 15). That attorney was opposed to the goals of the petitioner as regards the religious upbringing dispute, to the point that the trial court itself found that " the petitioner's attorney failed to exercise diligence" in representing the petitioner. (RT, Augment to Transcript on Appeal, June 2, 1993, filed Oct 25, 1994, page 8).

Cal Family Code §2030, section (a), specifically states that the purpose for contributory attorney fees is to ensure that each party has access to legal representation to preserve all of his or her rights. (emphasis added).

The court, by statute, was obligated, in making its attorney fee order, not only to be concerned with establishing the respondent's legal access, but also ensuring the preservation of legal representation for the petitioner, to preserve representation for all his rights. Those rights included the right to argue that his child was being harmed, the right to argue that there was an enforceable contract, the right to argue that he was defrauded, and the right to argue that best interests of the child point to protecting a child at the threshold of a reasonable likelihood of harm, and not requiring that harm be already present.

The Appellate Court, at oral argument, in response to the above, stated that the petitioner had no right to competent legal representation. (audiotape by Appellate Court of oral argument, October 18, 1995) The petitioner respectfully argues that by exerting § 2030 against the petitioner, such a right was established.

b. The Abuse of Discretion in the Improper Amount of Contributory Attorney Fees Taken From the Petitioner Had a Prejudicial Effect on the Outcome of the Case.

The imposition of contributory attorney fees, and the consequent lack of effective legal representation, had a prejudicial effect on the outcome of this case, as it relates not only to the child in question, in preventing the petitioner from presenting evidence that the child was being harmed, but also as to a matter of public policy as well. A central issue at trial was the threshold at which a court may intervene to place a religious upbringing restriction upon a parent in divorce, (irrespective of the presence or absence of any religious upbringing agreements), where a child was being raised into a second religion. This is a significant issue, in which the First Amendment rights of one parent are balanced against the best interests of the child. The petitioner sought a threshold of likelihood of harm to the child. The Appellate Court, however, ruled that a clear affirmative showing of harm must be present before restrictions could be ordered, a standard met only twice in this nation, in *Funk v. Ossman*, 724 P.2d 1247, (Ariz. 1986) and *Bently v. Bently*, 448 N.Y.S.2d 559 (N.Y. 1982). The court relied

on *Zummo v. Zummo* (Pa.Super.1990) 574 A.2d 1130, to reject "speculation" that "exposure" to inconsistent religious teachings is harmful to a child. (App. 1-10).

The *Zummo* court is the only court to have attempted to cite "commentaries and empirical studies" to buttress its position on this issue. *Zummo*, 574 A.2d at 1156, 1157. However, that court totally misread those "commentaries and empirical studies". When the Appellate Court relied upon *Zummo*, the error was compounded, and public policy was set, without any foundation.

To demonstrate that "exposure" to contradictory religions is not harmful to children, the *Zummo* court relied primarily on the work of Egon Mayer, a prominent sociologist at the City University of New York. (*Zummo*, id at 1156). In fact, the work of Dr. Mayer is the only empirical (scientifically gathered) evidence cited by the *Zummo* court. That court refers to Professor Mayer as "a noted sociologist who has conducted landmark research on religious intermarriage". (*Zummo*, id at 1132, footnote 1).

However, in a letter to this petitioner, dated two years prior to trial, Professor Mayer refutes application of his work to the claims of the *Zummo* court, writing, "the study (is) virtually inapplicable to the understanding of the particular situation of a child who is thrust by divorce into being raised in two religions." (Letter from Dr. Egon Mayer to Martin Weiss, July 16, 1990. Appendix 7-2).

The position taken by the *Zummo* court that "exposure" to contradictory religions is not harmful to children, is baseless. The Appellate Court in the instant case writes that it is "fortunate to have *Zummo* on the books as a resource in this troubling area of law". (App. 1-11, footnote 2).

Dr. Mayer had agreed to testify as an expert witness for the petitioner at trial, but the attorney hired for the petitioner refused to allow him to testify, as she did not agree with his position. The imposition of contributory attorney fees left the petitioner without an advocate for his position. Had Dr. Mayer the opportunity to

testify, the public policy that resulted from this case would quite possibly be different from the current result. At the very least, the Appellate court would have been required to consider the best interests of the child, and not assume that there is no consequence to children being indoctrinated into two conflicting religions.

The petitioner's critique of Zummo, and Dr. Mayer's refutation of the court's application of his work, is found in an article written by the petitioner, *The Enforceability of Religious Upbringing Agreements*, The John Marshall Law Review, Vol.25, Summer 1992, p 655-725, and published prior to trial. The attorney hired for the petitioner refused to include the arguments in that article in her trial brief, as she did not agree with the article's positions, neither on the enforceability of these agreements, nor the threshold at which courts should intervene, nor the argument that children can be harmed being raised into a second conflicting religion.

c. The Appeal From Contributory Attorney Fees Was Timely.

The Appellate Court ruled that the pendente lite attorney fee orders of July 29, 1991, and November 5, 1992, were immediately appealable, and that because the petitioner did not file a notice of appeal until October 1, 1993, appeal from those orders was untimely. However, October 1, 1993 was within 60 days of the trial court judgment, and therefore within the time limits for filing a notice of appeal as set by Rule 2 of the California Rules of Court. The pendente lite attorney fee orders were interlocutory, and therefore unappealable until trial. The notice of appeal was timely. As is stated in the standard California treatise on family law:

> " **§ 62.08 Appealability of Order**
>
> An order for the payment of attorney fees and costs pendente lite is appealable as a final judgment in a collateral matter, unless the trial court reserves jurisdiction to consider the matter further. In the latter case, the ruling is in the nature of an interlocutory order directing that further proceedings be taken before a determination is made, and is not appealable."

K. Kirkland, I Lurvey, D. Richmond, *California Family Practice and Procedure*, Vol.2, §62.08, Matthew Bender, 1996. Citing *Marriage of Jafeman* (1972) 29 Cal.App.3d 244,268,

The contributory attorney award made at trial on June 26, 1991, and dated July 29, 1991, reads in part, as follows:

> "Said contributive share of attorney fees is an advance without prejudice to either party....The court will determine the issue of attorneys fees at the time of trial". (App.3-4).

It is unequivocal that the attorney fee award was not appealable at the time it was made, and could not be appealed until the trial judgment. This is black letter law. And it remains the law. As of the February 1996 supplement to the above treatise, there is no change in the law. If it was the intent of the Appellate Court to change the law, and make all pendente lite attorney fees immediately appealable, it should have so stated in the opinion it published in this case. It elected to make no such statement. Therefore, to singularly apply this holding to this petitioner, and apply this holding to no one else, is a violation of due process, that prevents this petitioner from exercising his right to appeal. The Appellate Court's ruling that appeal of this issue from the trial court judgment was untimely, is an error.

The Appellate Court appears to have been misinformed as to the specifics of the orders, in calling those pendente lite orders directly appealable, for the court cited the following from the case law:

> "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken (Citations)"

In re Marriage of Skelly (1976) 18 Cal.3d at p.368) .

The key word is dispositive. Clearly, and unequivocally, dispositive here means as in a final settlement, . This is clear from the language of the Appellate Court, where the court explicitly stated "Such a determination is substantially the same as a final judgment in an independent proceeding." (App. 1-16).

Clearly, the pendente lite attorney fee order of June 26, 1991, was not dispositive on the issue of contributory attorney fees. How

can it be considered "dispositive" (final), when the court itself made the order non-appealable, by inking in that the award is an advance without prejudice to either party with the final amount of fees to be determined at trial. What other purpose could the trial court commissioner have had, other than to make the order not appealable, when she inked in the above additions to the order? And even if there was some other purpose for her adding by her hand, those provisions to the order, would not a neutral observer still interpret the order as being non-appealable?

The Court of Appeals lacks jurisdiction over non-final judg - ments. This was clearly a non-final judgment. By the very order itself, it was not appealable until the trial judgment. The appeal regarding those attorney fee awards was therefore not untimely. Furthermore CCP 904.1(a)(1) states that as a (general) rule, interlocutory judgments are not appealable. There are statutory exceptions to this rule, but none of those statutory exceptions relate to contributory attorney fees.

Even if the attorney fee orders were immediately appealable, (and they were not), an appeal at that time would have then been impossible for the petitioner. The contributory attorney fee order stripped the petitioner of his finances for his own legal represent- ration. As a consequence of that order, the petitioner was reduced to a pro-per status. The petitioner had no legal knowledge at that point in time, and certainly no knowledge as to how to proceed with an appeal. The "right" to appeal, with no legal knowledge, and no attorney, at point in time, was most certainly illusory.

Cal. Family Code §2030 deprived the petitioner of his funds and left him pro-per, without legal representation. Explicit in that statute, is the language that the purpose for contributory attorney fees is to ensure that each party has access to legal representation to preserve all his or her rights. How can one immediately appeal the order, when one is deprived of access to the courts by the very order one seeks to appeal? The improper order of the trial court commissioner should toll the limitation.

The court should be aware that there has been no demand for a return of the attorney fees (for fear of triggering further awards). What the petitioner has sought is a recognition that the unjust and excessive award prevented the petitioner from having a fair trial.

The Appellate Court ruled that the Trial Court properly declined to enjoin Marsha (the respondent) from any religious activity with the child, because the record supports a finding of a lack of harm to the minor. (Appendix 1-12). Any deficit in the record, whether regarding harm in general to children, or harm to this specific child, is due to the lack of effective legal representation on these issues. Whether the Courts agree or disagree with the positions taken by the petitioner, the petitioner did have a right to have those positions, and his evidence, presented. Were it not for the Trial Court's attorney fee awards, evidence of harm to the child would have been presented.

1. The Imposition of Contributory Attorney Fees Against the Petitioner, In A Religious Upbringing Dispute, To Be Used Against Him In That Dispute, Violates The Free Exercise of Religion Clause of the First Amendment, and the Religious Freedom Restoration Act.

At trial, and in his appeal, the petitioner has sought to maintain his child in the Jewish faith, into which he was born and raised. The religious upbringing dispute was the reason that the petitioner filed for divorce, and was the only significant contested issue at trial. As maintaining the Jewish faith in one's children is a central tenet of Judaism, the petitioner's legal efforts were, and are, an exercise of his religious beliefs. As such, the imposition of contributory attorney fees of $22,000, the primary purpose of which was to defeat his efforts, were a burden on the free exercise of religion, as per the First Amendment, and the R.F.R.A.

The petitioner, who was the victim of a fraud when the respondent feigned a conversion to his faith to induce the marriage, was required by the state to finance the taking of his child into the religion of the respondent. To be required by the state to finance

such a taking is a violation of the Free Exercise of Religion Clause of the First Amendment.

The taking of $22,000 by the state, for direct transfer to the respondent's attorney, was also an impermissible burden upon the petitioner, under the Religious Freedom Restoration Act, 24 U.S.C.A. 2000bb-1, recited at page 2 of this petition. Such a taking, even if resulting from "a rule of general applicability", as contributory attorney fees, is an explicit violation of section (a) of the above Act, when those funds financed the taking of his child into another religion. And as for the section (b) exception, what compelling governmental interest is there in financing the successful promulgation of fraud? The respondent voluntarily made a commitment to raise her children in the Jewish faith, a commitment upon which the petitioner relied, and it was not a change of heart, or spiritual growth or seeking that precipitated the dispute, but the fact that she never had any intention of honoring her commitments, and had committed a premeditated and egregious fraud. There is a compelling governmental interest in protecting religious freedom. There is no such compelling governmental interest in protecting, let alone furthering, a deliberate fraud. Frauds, committed in the name of religion, are not a compelling governmental interest. And what compelling governmental interest is there in compelling a divorced parent to finance the legal sanctioning of the right of the other parent to take his child "to marked heinous harm" (Respondent's Appellate Brief, p16, line 6).

2. The Seizure Of Separate Private Property By The State Of California, Under California Family Code §2030, Violates The 5th And 14th Amendments In The Taking Of Private Property, When Under No-Fault Divorce, The Party Whose Property Is Seized By The State, Is Guilty, Under Law, Of No Wrong Doing.

The imposition of contributory attorney fees, from separate property, under no-fault divorce, fits no recognizable theory of law, in meeting none of the criteria for being a tax, a fee, a fine, or an exercise of police power.

Contributory attorney fees are clearly not a tax. They are applied on an ad hoc basis, at the discretion of the court, to one individual at a time. Nor are contributory attorney fees a fee. For the definition of fee to be applied, the individual being charged with the fee must accrue a benefit commensurate with the fee. It is unclear how a Jewish father obtains any benefit whatsoever, in financing a successful legal effort to permit the indoctrination of his child into the Christian faith. And it is unclear how in a custody dispute, a father accrues any benefit whatsoever, in financing the legal efforts to remove his children from his custody.

Contributory attorney fees, under Cal Family Code §2030, are not a fine. Divorce, in California, is no-fault. A fine can only be applied for wrong doing. Curiously, however, and significantly, under California Family Code §274, contributory attorney fees are fines, i.e. sanctions.

There is no substantial difference between §2030 and § 274 other than for the motive of the court in making its award. When the award is made to "establish parity between the spouses", it is labeled a fee. When it is made to punish the spouse, its a sanction. But the corpus of the statutes, the involuntary forfeiture of money from one party, for the purposes of direct transfer to the antagonistic party, are absolutely identical. The label is different, but the product is identical.

§2030 would appear, then, to be punitive. The seizure of one's private and separate property by the state, is not a neutral act, for the victim is that much the poorer. It is financially painful; moreover, the victim's moneys are not merely being seized by the state for general revenue purposes, but are being turned specifically against him, on an issue most critical to him, the custody of his children. The imposition of §2030 most certainly, then, has "the character of punishment or penalty". "Having the character of punishment or penalty" is the definition for "punitive". *Black's Law Dictionary*, 5th ed. p1110.

§2030 is punitive in its results, even if not in it's ostensible intent. It is a punitive statute. Black's Law Dictionary defines punitive statute as "One which creates forfeiture or imposes penalty." *Black's Law Dictionary*, 5th ed. 1110.

Imposition of a punitive statute on one who is by definition innocent of any wrong doing, as one is under "no-fault" divorce, would appear to be inconsistent with the basic principles of American law. It is also impermissible under California law....."The validity of an act is to be determined by its practical operation and effect, and not its declared title or purpose..." *Frost v. Los Angeles*, 181 Cal 22, 183 P 342.

Contributory attorney meet not one of the requirements for being an exercise of police power of the state. These requirements are enumerated in 16 Amer Jur.2d § 365. Among these, are that under police power, when property or the right to property is taken from the owner, "this is not accomplished by a transfer of ownership, but by destroying the property or impairing it's value". 16A Am Jur 2d §365, p41, citing *Rose v. State*, 19 Cal2d 713, 123 P2d 505; *Pacific Tel & Tel Co. v. Eshleman*, 166 Ca 640, 137 P 1119.

In the instant case, $22,000 was ordered transferred from the petitioner, directly to the respondent's attorney. That money was not destroyed, nor was it regulated. In this case, ownership was transferred. As such, that action does not meet even the most basic definition of the exercise of police power. Nor was that property transferred to the public coffers, for the public benefit, as required under the exercise of police power, but rather that property was transferred solely to, and solely for the benefit of, a private party.

The concepts which underlie police power are not present in contributory attorney fees. A central concept, "*Sic utere tuo ut alienum laedas*", so use your own that you do not injure that of another", is hardly applicable for a "leveling" of the "playing field", vis-à-vis legal representation. Were such the case, in every civil litigation, whether it be contracts or torts, any party would be required to pay for the legal representation of the other party, based

purely on the comparative financial strengths of the parties, irrespective of fault. By such logic, a rape victim, in a civil suit, would be required to pay for the legal fees of her rapist.

Contributory attorney fees in the instant case were not awarded for the public's welfare. They were awarded for the expressed benefit of a private party. And even if they were awarded for the "public's" welfare, there was no evidence for necessity. There was no evidence presented to the court by the respondent that she was unable to work to earn her legal expenses, nor was there any inquiry by the court as to whether she could work to pay for her expenses.

3. Does The Seizure Of Separate Private Property Under California Family Code §2030, Thwart Or Otherwise Have An Impermissible Chilling Effect On The Attempt To Exercise The Fundamental Right Of Raising One's Child?

Even were contributory attorney fees to meet the criteria for being an exercise of police power, they would still be impermissible, for violating the 5th and 14th Amendments of the Federal Constitution, and for infringing upon, and having a chilling effect upon, a fundamental right.

Contributory attorney fees, in a custody dispute, certainly infringe upon a fundamental right. The right to raise one's children has been found by the U.S. Supreme Court, to be a fundamental right. *Pierce v. Society of Sisters*, 268 US 510, see also *Michael H. v. Gerald D.*, 109 S.Ct.2333. Custody is the right to raise one's children. Custody is a fundamental right.

Contributory attorney fees not only aid the adversary in the battle for custody, but they weaken the father, by removing funds that he may need, and in this case, did need, for his own efforts. Moreover, the mere threat of contributory attorney fees, let alone their actual imposition, must certainly prevent many fathers from contesting custody, for as regards custody, the law as applied in the courtroom is quite different from the law on the books. Where the

battle is for sole custody, if the mother is competent, and the child is of tender years, the mother will virtually always prevail. (see below). Under such conditions, a father is unlikely to squander limited resources on a likely futile battle, particularly if he must not only pay his own legal expenses, but that of his wife.

The Supreme Court is invited to inspect how the concept of contributory attorney fees has been utilized by the respondent's attorney. A post judgment letter, one of several, threatens the petitioner with the assessment of contributory attorney fees as sanctions unless his "frivolous appeal" is withdrawn. (App. 8-2). Yet, this same attorney specifically requested of the Appellate Court that this "frivolous" case be certified for publication. (audiotape by Appellate Court of oral argument, October 18, 1995).

It is impermissible for a statute to have a chilling effect on a fundamental right. This statute most certainly does.

"...The police power of the state must be exercised in subordination to the provisions of the Federal Constitution..." 16A Am Jur 2d §392, p94, citing *Wood v. Hamaguchi*, 207 Cal 79, 277 P 113, 63 ALR 861, which states that "The legislature cannot, under the police power, do something that is expressly or impliedly forbidden by a provision of the constitution."

Clearly, any exercise of police power must take at least passing note of the 5th and 14th Amendments of the Constitution. It is also clear that in imposing contributory attorney fees against parties guilty of no crime other than being served with divorce papers, and guilty of no crime other than seeking to exercise their right to maintain a parental relationship with their child, the State has seen fit to ignore those constitutional guarantees.[1]

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[1] Additional constitutional guarantees, as well, are ignored in such fees. The imposition of contributory attorney fees in the case at bar is further impermissible by a recent decision of the California Supreme Court. In *Smith v. Regents of the University of California*, 4Cal.4th; 16 Cal.Rptr.2d 181; 844 P.2d 500, the Supreme Court ruled that the imposition of mandatory student activities

The legitimate exercise of police power requires that to infringe on a fundamental right, no other alternative be available. The issue here is not parity in legal representation for spouses. The issue is how to finance that parity. Clearly, other alternatives are available to finance that goal. Of those other alternatives, not the least of which would be for the state to provide public attorneys for divorcing parties who cannot afford an attorney, much as public defenders are available for indigent defendants; or for the state to subsidize the cost of attorneys via its tax revenues. At the very least, the state was obligated to at least consider such alternatives. There is no evidence, however, that it ever even did this.

Certainly, the police power of the state has expanded, and is now quite elastic. But when the property of those who are guilty of no wrong doing is seized, it is under the theory that the property itself committed the wrongdoing. *Bennis v. Michigan*, 134 L.Ed.2d 68, 116 S.Ct. 994 (1996). But under no-fault divorce, by definition, the separate property, like the separating parties, is guilty of nothing. If innocent property can be seized, the police power of the state is no longer elastic; it is infinite. The awarding of contributory attorney fees, from separate property, in a custody dispute, under no-fault divorce, is not an exercise of the police power of the state. It is, on the contrary, a simple taking.

At this point, it is warranted to address the issue of fault, and fraud. The feigned conversion of the respondent to induce the marriage (RT,p244,lines 4-6) is an egregious fraud. Yet prevailing opinion holds that fault, and presumably fraud, as well, are irrelevant in the making of custody determinations. The attitude of

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fees by the University of California at Berkeley was constitutionally impermissible, as a portion of those fees were used to fund political and ideological groups, and that action violated the constitutional rights of freedom of speech and association of those students who opposed those groups views. If the mandatory imposition of a $22 student activity fee, only a small portion of which is used for activities to which a party is philosophically opposed, is constitutionally impermissible, what then of the mandatory imposition of a $22,000 fee, imposed specifically for defeating a parent's attempt at custody, and specifically for the purpose of defeating a parent's attempt to maintain the religion of his child?

California courts is like that enunciated by Neely, "The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to or influenced by, such behavior." R. Neely, *The Primary Parent Rule: Child Custody and the Dynamics of Greed,* Yale Law& Policy Review, 3:168,181 (1984).

No-fault divorce is defined as "morally neutral". L. Weitzman, *The Economic Consequences of Divorce*, 8 Family Law Reporter 4038, August 3, 1982. It is difficult to criticize a principle that consists of a variation of the word moral, and contains the word neutral, as well. "Morally neutral", however, is an oxymoron, but discussion in this regard would take us into theological and philosophic digression. A better tack would be to replace the word "neutral" with "indifferent". "Neutral", within the context used in the definition, is synonymous with "indifferent",

Courts, then, in making custody determinations, are "morally indifferent". "Morally indifferent" is synonymous with amoral.

The intellectual foundation for "moral neutrality" in divorce law is from the field work of Margaret Mead. That work, purportedly scientifically gathered, has since been disclosed to have been invented. J.Leo, *Bursting the South Sea Bubble* , Time Feb.14, 1983, page 68.

It is unclear, if "moral neutrality" has been so successful in divorce law, why it is not also extended to other areas of law as well. For instance, embezzlement is no more amorphous a concept than adultery. Why not extend "moral neutrality" to embezzlement as well? Moreover, if "moral neutrality" applies to fraud in marriage, i.e., a sham commitment to raise the future children in the religion of the other partner, why should not "moral neutrality" apply in, for example, real estate fraud as well?

Such applications would destroy any area of law. It is unclear then, why such an outcome had not been postulated for marriage.

What is proposed here is not a return to considerations of moral values, per se, in divorce law. The refrain, of course, in reintroducing moral values, is "whose moral values?" There is no need, however, to engage in a philosophical discussion on moral relativism, or enter into a survey on the values of this nation. To accomplish the purposes required, one need only look on marriage as a contract, and utilize that contract as the code for behavior. It can be assumed that marriage is a monogamous institution, therefore entering into marriage commits one to monogamy. Similarly, it can be presumed that entering into a Christian or Jewish marriage commits one to raising children in the Christian or Jewish faith. There is no valid reason, as long as the best interests of the child are not significantly compromised, not to take into account the rights of an aggrieved party in a divorce.

The courts have divorced custody from fault. The purpose for this decoupling was either expediency, or conviction. Expediency - to remove "clutter" from the calendar. Conviction - to remove an implied governmental endorsement of Judeo-Christian moral values. Irregardless, whether due to political cynicism, or political correctness, the result is the same.

California Family Code §2335 states that "evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is an issue and such evidence is relevant". There was misconduct in this case. The consequence of that misconduct is relevant to the well-being of the child.

4. The Seizure By The State Of California, Under California Family Code §2030, Of Separate Property Overwhelmingly From Husbands And Fathers, For The Sole Purpose Of Transferring That Property To Wives And Mothers, Is Impermissible Gender Based Discrimination.

Even if contributory attorney fees are held to be an exercise of police power of the state, the intent of that exercise of police powers must still be a permissible intent. The ostensible intent of

contributory attorney fees is to "level the playing field" between the parties. Continuing with the unfortunate, but accurate, game analogy, is the intent of those fees to level the playing field, or to drive one gender off the playing field?. By the statutory history of such fees, they were explicitly intended solely for the benefit of women. The progenitor of Family Code § 2030, California Civil Code §137 (approved 1907), directed that attorney fees be applied only against the husband, for benefit of the wife. That statute was amended in 1927, to permit contributory attorney fees to be assessed against the wife as well, for benefit of the husband.(see *Hopkins v Detrick*, 97 C.A.2d. 50, at 58). However, since that date, there is not a single reported case in which a father was awarded contributory attorney fees from a mother in a custody dispute.

Contributory attorney fees are part of larger policy designed to prevent fathers from gaining custody of their children. The linchpin of that policy is the primary caretaker rule, which is controlling in California law. [2]

Richard Neely, Chief Justice of the West Virginia Supreme Court, in *Garska v. McCoy*, created the primary caretaker presumption, as a means by which the old maternal preference could be continued, but now under the ostensible cloak of sex-neutral language. (*Garska v. McCoy*, 278 S.E.2d 357, 362 (W.Va 1981).[3] Judge Neely has decreed that an "explicit and almost

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[2] As was stated by the Supreme Court of California in a recent custody decision in favor of the mother, "First, and most important, although the children saw their father regularly, their mother was...as a factual matter, their primary caretaker." (*In re Marriage of Burgess*, 13 Cal4th 25, 1996). Emphasis added. The primary caretaker is the parent who prepares the meals, chauffeurs the child to the school, interacts with the child's friends etc. R. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale Law and Policy Review 168, 180 (1984).

[3] It is unequivocal that *Garska v. McCoy* is the leading case on the issue. *Garska v. McCoy* is cited in every current family law text and reference. In one such text, H. Clark, *The Law of Domestic Relations in the United States*, 800 (1988), the opinion is cited 6 times, every argument to support the presumption is Neely's, and every argument presented cites *Garska v. McCoy*. In J. Areen, *Family Law: Cases and Materials*, 664 (1992), it is *Garska v. McCoy* that is presented as the case to represent the primary caretaker principle. In R.

absolute preference" be given to the "primary caretaker" parent. (Id). He also openly admits that primary caretaker parent is merely a euphemism for mother.

> "While in J.B. v. A.B., supra, we expressed ourselves in terms of the traditional maternal preference, the Legislature (West Virginia) has instructed us that such a gender based standard is unacceptable. Consequently, all of the principles enunciated in *J.B. v. A.B.*, supra, are reaffirmed today except that where-ever the words 'mother,' 'maternal,' or 'maternal preference' are used in that case, some variation of the term 'primary caretaker parent,' as defined in this case should be substituted" (*Garska v. McCoy*, W.Va., 278 S.E.2d 357,363 (1981

The rule has no interest in determining the better parent, but only in determining that the "primary caretaker" i.e. mother, meets a minimum standard of competency.

> "Once the primary caretaker has been identified, the only question is whether that parent is a fit parent.... the court is not concerned with assessing relative degrees of fitness between the two parents, but only with whether the primary caretaker achieves a passing grade on an objective test."

Mnookin and D. Weisberg, *Child, Family and State*, 726, it is noted that "The first case to adopt the (rule)(was) *Garska v. McCoy*." *Graska v. McCoy* is cited in the legal literature as being "the leading primary caretaker preference case" in R. Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce:Reconciling the Primary Caretaker and Joint Custody Preferences*, University of Richmond Law Review, Vol 20:1 at 63, (1985). When opinions make citations to the primary caretaker rule, it is *Garska v. McCoy* they uniformly refer to. (e.g. *Pikula v. Pikula*, 374 N.W.2d 705, Minn. 1985; *Commonwealth ex. Rel. Jordan v. Jordan*, 302 Pa.Super 421, 448 A2d 1113, 1982; *Thompson v. Thompson*, 511 N.e.2d 412, 1987. Additional cases omitted for space constraints). The article which announced the principle in the legal literature was penned by Neely. (R. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale Law and Policy Review 168, 1984). In addition, Neely has authored a widely quoted book promoting the principle (R. Neely, *The Divorce Decision* , 1984). He has also expounded on the principle in the mass media (e.g. ABC Nightline with Ted Koppel, 1988). The views of Judge Neely are widely available and disseminated, to family attorneys and Justices. If there are any advocates of the principle who differ with Neely 's definition of purpose for the principle, they have yet to make themselves known.

(R. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed.* 3 Yale Law and Policy Review 168, 181 (1984). The primary caretaker rule has no interest in the better parent. The presumption explicitly ignores the best interests of the child. [4]

Is a father any less loving, nurturing or capable a parent than a mother, because he has to work during the day, to pay for groceries, and meet house payments? Without any exaggeration, by the criteria laid down by the primary caretaker rule, in many divorce cases, the children would go to neither the mother or father, but rather to the hired live-in housekeeper. The language is certainly contrived. Hallmark Cards does not yet offer "secondary caretaker" cards for father's day.

The purpose for the rule, as openly stated by Neely in the article in which he introduced the rule, is to advance the power of women in divorce proceeding, by precluding fathers from contesting custody. (R. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale Law and Policy Review, 168 (1984). [5]

It is irrefutable that the purpose of the primary caretaker rule is to deny fathers the opportunity to effectively contest custody.

> "Under our system a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent, she has *absolutely no chance* of losing custody of very young children."

R. Neely, *supra*, at 182, emphasis not added.[6]

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[4] Neely admits "There are instances where the primary caretaker will not be the better custodian." R. Neely, *The Primary Caretaker Rule, supra*, at 180.

[5] Neely states the motives of fathers in seeking custody is greed. However, he admits that "there is very little hard evidence to support this theory that parents use the specter of custody proceedings to gain leverage in financial settlements." *Garska v. McCoy, Id* at 362, n.7. In fact, the evidence Neely presents, in toto, consists of a footnote noting an interview, on file with the Yale Law Journal, with the Assistant Clerk of New Haven County Superior Court. *(Id.)*.

[6] Reviews have examined the psychological and sociological evidence on the issue of mothers v. fathers as parents, and found no evidence to support such discrimination in favor of mothers. (A. Roth, *The Tender Years Presumption in*

It is also irrefutable that fathers have been denied the opportunity to fight for custody of their children, because of the primary caretaker rule. There is not a single reported case in California in which a father won custody on the basis of the primary caretaker principle. There are but three reported cases nationwide in which fathers arguably may have won custody on the basis of the principle, and in only one of these cases was the child of tender years (under eight years old).[7] The tender years/

Child Custody Disputes, 15 Journal of Family Law, 423,462; D. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Michigan Law Review, 477,518 (1984). The only evidence Neely cites, in R.Neely, *The Primary Caretaker Parent Rule*, at 171, that even remotely relates to the issue at hand is the work of Sharon Araji , who in a letter to this petitioner writes "I found the reporting of my study results (by Neely) not only interesting, but completely opposite of what was reported for that particular role, i.e. child care" Letter from S. Araji to petitioner, dated August 7, 1990, on file with petitioner.

[7] The "case law" has been reviewed in an annotation by Andrea Nadel (A. Nadel *Primary Caretaker Role of Respective Parents as a Factor in Awarding Custody of Child*, 41 ALR4th 1120. The annotation lists over 40 decisions in which fathers were awarded custody where the primary caretaker concept was a "significant factor". However, even the most cursory review of Nadel's purported cases reveals the primary caretaker principle had either no, or essentially nil, impact on those decisons. In all but three of the cases, the court had reason to believe the mother was, or would be, the inferior parent (e.g. abandonment of children, mental illness, maternal neglect, threatening behavior, instability). The premise by which the primary caretaker principle is justified is that it is gender neutral. Nadel's annotation implies there is some meat on the skeleton of that premise. In point of fact, there is none. The key question is this. In how many instances has a father won custody over a mother, who was equally competent as a parent, on the basis of his being the primary caretaker? There are but three such cases, (*Saint-Pierre v. Saint Pierre*, 357 N.W.2d 250, *Heim v. Heim*, 394 N.W.2d 254 (Minn.App.1986); *McCabe v. McCabe*, 430 N.W.2d 870). These represent a total of six children over the course of 12 years. These numbers can be placed in perspective. A significant number, if not the majority of cases, in which a competent mother lost custody on the primary caretaker basis, would likely have been appealed. And a significant number, if not the majority of cases, in which the father prevailed, would have been published, if only to demonstrate that the primary caretaker rule is gender neutral.

There are 200 deaths per year from lightning in this nation. P. Gross, *Environmental Hazards*, in E. Wilkens, *Emergency Medicine*, p 204. Over 12 years, this comes to 2,400 deaths. If 30% of these deaths are women (most

maternal preference presumption, contrary to the assertions of academia and the media, is still operative, and controlling.[8]

Space constraints preclude analysis here, in terms of level of scrutiny, of the primary caretaker principle, and contributory attorney fees. Clearly, however, these are gender based violations of due process and equal protection, maintained to deny the most fundamental of rights. Would there be any doubt that such was the case, were it women that were the target of such denial of a fundamental right, or a racial minority?

If the Court is still not persuaded by the above data and analysis, it might consider that by its own language, it has established that the burden of proof on such issues lies not with this petitioner, but with the State. For as was stated just recently by this Court:

> Focusing on the differential treatment of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and rests entirely on the State...The justification...must not rely on over broad generalizations about the different talents, capacities, or preferences of males and females.

United States v. Virginia, 64 LW 4643

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females have too much sense to continue golfing as thunderstorms approach), and if but 5% of these women are mothers of children of tender years, that is 36 mothers killed by lightening during this 12 year period. What this means is that a father is more likely to obtain custody of his children via a bolt of lightening, then he is via the primary caretaker rule. As the former is an occurrence that would be desired in only the bitterest of divorces, and as few attorneys, regardless, have such connections, custody against a fit mother is a nil prospect.

[8] However, fathers do maintain parental rights under joint physical custody, which is ordered in 5% of custody arrangements. G. Kolata, *The Children of Divorce*, New York Times, March 31, 1988 B13. Joint legal custody, with physical custody to the mother, is largely an empty shell, in which there is no increase in a fathers' involvement with their children. C. Albiston, E. Maccoby, R. Mnookin, *Does Joint Legal Custody Matter?*, Stanford Law and Policy Review, p 167,176, Spring 1990. Fathers can, and do, win sole custody, when the mother does not desire custody, or when she is clearly unfit. Again, however, if the mother is even minimally fit, this is a nil prospect.

The parental rights of tens of thousands of fathers to their children, lost yearly, should at the very least, warrant the same degree of attention and scrutiny from the Court, as the right of young women to attend the Virginia Military Institute.

CONCLUSION

The issues raised in this case run to the core of American Family law, and expose critical constitutional problems in a public policy created or endorsed by the lower courts. The Supreme Court here has an opportunity to set right, what has been set wrong. For the reasons set forth above, the Petitioner respectfully requests that this Petition for Writ of Certiorari be granted. The Supreme Court should order a rehearing on the issue of harm to the child from indoctrination into a second conflicting religion, and should render Judgment that California Family Code §2030, as currently applied against separate property, is unconstitutional.

Respectfully submitted

Martin Weiss, M.D.
In Propria Persona
6345 Daylight Drive
Agoura Hills, CA 91301
(818) 879-5008

APPENDIX 1

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL - SECOND DISTRICT
FILED
JAN 31 1996

In re the marriage of Martin Meyer Weiss and Marsha Nadeen Weiss

B083168

(Super. Ct. No. NWD119894)

Martin Meyer Weiss
Appellant
v.
Marsha Nadeen Weiss
Respondent

APPEAL from further judgment on reserved issues and attorney fees orders of the Superior Court of Los Angeles County. Minna Fried, Temporary Judge. Pursuant to California Constitution, article VI, section 21. Judgment affirmed; purported appeals from attorney fees orders dismissed.

Martin Meyer Weiss, in pro per., for Appellant.

Rehwald Rameson Lewis and Glasner and Thomas Trent Lewis, for Respondent.

Martin Meyer Weiss (Martin) , in propria persona, appeals a further judgment on reserved issues, involving the religious upbringing of the child (minor) born of his marriage to Marsha Nadeen Weiss (Marsha). [1] Martin also purports to appeal pendente lite attorney fees orders.

At the present time, Martin and Marsha apparently are adherents of different religions, although during the marriage they practiced the same faith. The essential issue presented is whether the trial court properly denied Martin's request that Marsha be enjoined from engaging in certain religious activity with the child.

We conclude that Marsha's written antenuptial commitment concerning the future religious upbringing of any children born of the marriage is not legally enforceable. Further, Martin did not meet his burden of presenting a clear affirmative showing the child would be harmed by Marsha's conduct. Therefore the trial court properly refused to enjoin Marsha's religious activity with the child.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 1984. Martin is Jewish. One month before the marriage, Marsha, who was a Baptist, converted to Judaism. At the time of her conversion, she executed a "Declaration of Faith", witnessed by three rabbis, "pledging to rear

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[1] We refer to the parties by their first names for purposes of clarity and not out of disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn.1; *Askew v. Askew* (1994) 22 Cal.App.4th 942, 947, fn.6.)

all (their) children...in loyalty to the Jewish faith and its practices."

The parties have a son, the minor, born in 1985.

In December 1989, Martin filed a petition for dissolution of marriage.

On July 29, 1991, the trial court entered an attorney fees order directing Martin to pay Marsha $10,000 as a contributive share of her attorney fees and costs.

On August 25, 1992, judgment of dissolution as to status only was entered, reserving jurisdiction over remaining issues, including custody.

On August 25 through 28, 1992, the bifurcated issues of the minor's custody were litigated. Both parents testified. Marsha was now attending the Calvary Church. She had enrolled the minor in Sunday school at the church. In addition, the minor had attended a club meeting at the church on Wednesday evenings and had gone to church camp the previous summer. Martin acknowledged Marsha had the right to expose the minor to her religion, but objected to the minor's being indoctrinated in the Christian faith or being enrolled in any activity "that would be contrary to his Jewish faith".

On November 5, 1992, the trial court ordered Martin to pay an additional $12,000 of Marsha's attorney fees and costs.

On August 4, 1993, the trial court entered a further judgment on the reserved issue of custody. The trial court refrained from restraining either parent's religious activity with the minor. It ruled, inter alia:

The parties were awarded joint physical and legal custody of the minor. The minor was to spend every Monday and Tuesday with Marsha and every Wednesday and Thursday with Martin. Each party was awarded alternate weekends, from Friday after school until Monday morning.

As for religious holidays, Martin had the first and second day of Passover, Yom Kippur and Rosh Hashanah. Marsha was allotted Purim and the third night of Passover, conditioned upon her taking the minor to a synagogue on those holidays. In addition, she was awarded Christmas Eve, Christmas Day and Easter Sunday.

With respect to enrollment in religious studies, Martin was permitted to enroll the minor "in Hebrew Jewish Studies program, up to two times per week, regardless of his custody schedule. This religious training program shall have priority over any other schedule or activity. Except as provided herein above, nothing in this Order is deemed to prevent either part from enrolling the child in or having the child participate in other religious programs or activities during their respective custodial time."

On October 1, 1993, Martin filed notice of appeal from the August 4, 1993 further judgment on reserved issues. The notice of appeal also specified the trial court's July 29, 1991 and November 5, 1992 orders for contributory attorney fees.

CONTENTIONS

The essence of Martin's numerous contentions is that the trial court erred in refusing to enjoin Marsha from engaging the minor in religious activity, and in making the attorney fee orders.

DISCUSSION

1. A parent will not be enjoined from involving a child with the

parent's religious activities absent a clear affirmative showing of harm.

As was stated in *Zummo v. Zummo* (Pa.Super. 1990 574 A.2d 1130, 1132, "custody and visitation cases essentially involve salvaging operations. Judges are asked to preserve, as best as may be, the interests of any children involved, while at the same time disentangling their parent's spousal relationship. Under the best of circumstances it is a task requiring Solomonic judgment. The difficulties are compounded when emotional issues such as religious upbringing of children are involved". (Italics added).

Here, the issues of the minor's religious upbringing and the enforceability of the parties' antenuptial agreement requires sensitivity to the best interests of the child as well as the First Amendment rights of both parents. Our focus is upon the showing required before a court will enjoin Marsha from exposing the minor to her faith.

The United States Supreme Court specifically has held parental authority in matters of religious upbringing may be encroached upon, only upon a showing of a "substantial threat" of harm to the "physical or mental health of the child or to the public safety, peace, order, or welfare." (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 230 (32 L.Ed 2d 15); see *Zummo*, supra, 574 A 2d at p. 1138) *Yoder* explained "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" (*Id.*, at p. 215) [2] [3] This fundamental principle informs our decision.

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[2] *Wisconsin v. Yoder, supra*, 205 U.S. at page 234, held the First and Fourteenth Amendments prevented the state from compelling Amish parents to send their children to formal high school to age 16.

[3] The Religious Freedom Restoration Act of 1993 (RFRA), in its declaration of purpose, states the Congress finds "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." (42 U.S.C. §2000bb. (a)(4).) Congress responded to that Supreme

Turning to California law, the case of *In re Marriage of Murga* (1980) 103 Cal.App.3d 498, did not involve an antenuptial religious upbringing agreement but in nonetheless is relevant to the issues before us. *Murga* adopted a rule of nonintervention with respect top a noncustodial parent's right to express his or her religious beliefs.

The question presented in *Murga* was "whether, in the absence of a showing of harm to the child, the custodial parent may enjoin the noncustodial parent from discussing religious subjects with the child or from involving the child in the noncustodial parent's religious activities." *Murga*, supra, 103 Cal.App.3d at p.504, italics added.) Given the dearth of California authority, *Murga* looked to the case law of other states. It found "in the majority of American jurisdictions that have considered the question, the courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear affirmative showing that these religious activities will be harmful to the child." (*Id.*, at pp 504-505, italics added.)

Murga reasoned adoption of the majority rule in California "would be consonant with the rule consistently followed by our courts that custody decisions will not be governed by the religious tenets or practices of parents absent a clear showing that the the parents religious practices would be harmful to the child." (*Murga, supra*, 103) Cal.App.3d at page 505.) *Murga* also observed "(t)he refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and

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Court decision by enacting the RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." (42 U.S.C.§ 2000bb, subd. (b)(1); see e.g. *Jolly v. Coughlin* (S.D.N.Y. 1995) 894 F.Supp.734, 740-741.)

expressions of belief, as well as the proscription against preferring one religion over another. (Citations.)" (Ibid.) Additionally, *Murga* was mindful of the public policy of this state to assure minor children of "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,..." (Civ.Code, form. § 4600; see now Fam.Code § 3020; *Murga*, *supra*, at pp. 502-503.)

Consequently, *Murga* concluded "a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." (*Murga*, supra, 103 Cal.App.3d at p.505.)

A subsequent California case, *In re Marriage of Mentry* (1983) 142 Cal.App.3d 260, 261-262, invalidated a restraining order which prohibited the father "from engaging the children of the dissolved marriage in any religious activity, discussion, or attendance during visitations and from providing them with articles, publications, or other religious material, while they (were) in his presence."

Mentry cited with approval *Felton v. Felton* (1981) 383 Mass.232 (418 N.E.2d 606), which stated "harm to the child from conflicting religious instructions or practices, ...should not be simply assumed or surmised; it must be demonstrated in detail." (*Mentry*, supra, 142 Cal.App.3d at p. 265, italics deleted.) After a review of the evidence, *Mentry* reversed, finding an absence of harm to the children. (Id., at at p.262.) With respect to the evidence of alleged harm, *Mentry* concluded: "Boiled down, it simply consists of testimony by the mother concerning her distress at (the father's) religious activities with the children, and speculative testimony by a counselor who had never seen or interviewed the children. There was evidence that the boy had social adjustment problems in school for which he received psychological counseling, but no evidence relating these problems,

or periodic stomach aches which both children assertedly suffered, to conflict over religion. There is no evidence of any other physical, or emotional problems. Indeed, the mother conceded that aside from the stomach aches and some aggressive behavior of the son, 'the children are basically physically and mentally well adjusted' and are both "normal...in every aspect.' The record contains no competent evidence that the children will in the future be harmed by the parental religious conflict. (The mother) has thus failed to meet her burden of 'a clear affirmative showing that these religious activities will be harmful to the child(ren)." (Id., at p. 266, italics added.)

2. *Zummo*, refusing to enforce an antenuptial religious upbringing agreement, is in accord with *Murga* and *Mentry*.

After the California decisions in *Murga* and *Mentry*, a Pennsylvania appellate court decided *Zummo v. Zummo*, supra, 574 A.2d 1130 ij 1990 in an exhaustively researched and well reasoned opinion. Given the lack of pertinent California authority, it is appropriate to examine how our sister state has dealt with the issue of differing religious practices by parents in the aftermath of a divorce, against the backdrop of an antenuptial agreement concerning religious upbringing. (See *Murga*, supra, 103 Cal.App.3d at pp. 504-505.)

Zummo involved a 10-year marriage between a Roman Catholic father and Jewish mother. Their three children were being raised in the Jewish faith. Prior to the marriage, the parents discussed their religious differences and orally agreed any children they might have would be raised as Jews. (*Zummo, supra*, 574 A.2d at pp. 1145.) Following a divorce and shared custody, issues arose concerning religious exposure during custodial periods with the father. The trial court made a custody order requiring the father to arrange the children's attendance at their synagogue's Sunday school during his weekend visitation. The trial court also prohibited the father from taking his children to religious services

"contrary to the Jewish faith" during his periods of lawful custody or visitation. (*Id.*, at p. 1142.) the father appealed, asserting his constitutional rights were violated by the order.

Zummo struck down that restriction, observing "(u)nder Pennsylvania law, each parent has parental authority during lawful periods of custody or visitation. Consequently, such a parent may pursue whatever course of religious indoctrination which that parent sees fit, at that time, during periods of lawful custody or visitation. (Citations.) If the other parent objects and seeks restrictions, the objecting parent must establish a substantial risk of harm in the absence of the restriction proposed." (*Zummo*, supra, 574 a.2D AT P. 1140.)

In arriving at its decision, *Zummo* went to great lengths to advise itself as to existing law throughout the United States through resort to appellate decisions and learned commentators on the issue of whether a pre-divorce agreement regarding the religious upbringing of children may be given legal effect over the objections of one of the parties to the agreement. (*Zummo*, supra, 574 A.2D AT P. 1144.) In determining such agreements are not legally enforceable, *Zummo* found "several persuasive grounds upon which to deny legal effect to such agreements. ¶ 1) such agreements are generally too vague to demonstrate a meeting of minds, or to provide adequate basis for objective enforcement: ¶ 2) enforcement of such an agreement would promote a particular religion, serve little or no secular purpose, and would excessively entangle the court in religious matters; and ¶ 3) enforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses (as well as their state equivalents) that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs," (*Zummo*, supra, 574 A.2d at p. 1144.)

Thus, *Zummo* held, similarly to the earlier decisions of *Murga* and *Mentry*, "each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period(s) of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction." (*Zummo*, supra, 574 A.2d at pp. 1154-1155, italics added.)

Consequently, "while religious upbringing agreements may serve an important and beneficial purpose by promoting careful consideration of potential difficulties prior to marriage...a hopeful... prenuptial assurance of a future commitment to an agreed... course of religious instruction for than as yet unborn children in the event of divorce (an often unconsidered possibility), must remain as legally unenforceable in civil courts as the wedding vows the parties even more solemnly exchanged." (Zummo, supra, 574 A.2d at 1147, italics added.)

a. No presumption of harm from mixed religious upbringing.

With respect to the likelihood of harm to the child as a consequence of exposure to inconsistent religious teachings, *Zummo* "rejected speculation by parents and by experts as to potential future emotional harm to a particular child based upon the assumption that such exposure is generally harmful." (*Zummo, supra*, 574 A.2d at p. 1155.) *Zummo* ruled "the speculative possibility of mere disquietude, disorientation, or confusion arising from exposure to 'contradictory' religions would be a patently insufficient 'emotional harm, to justify encroachment by the government upon constitutional parental and religious rights of parents, even in the context of divorce." (*Ibid.*) *Zummo* also recognized, as does this court, that emotional distress to a child "arising from a parental dispute regarding a child's religious upbringing may depend more on the manner in which the dispute

is conducted, than the theological aspects of the dispute itself. " (*Id.*, at p. 1156.)

Refusing to presume that exposing a child to contradictory religions is generally harmful, *Zummo* held "in order to justify restrictions upon parent's rights to inculcate religious beliefs in their children, the party seeking the restriction must demonstrate by competent evidence that the belief or practice of the party to be restricted actually a substantial threat of present or future physical or emotional harm to the particular child or children involved in the absence of a proposed, and that the restriction is the least intrusive means to prevent the specified harm. (*Zummo, supra*, 574 A.2d at p. 1157.)[4] [5]

b. Martin's critique of *Zummo*.

Understandably, Martin feels passionately about his son, his religion and his son's religious upbringing. Few aspects of the human condition can rival the emotional power of the combination of issues presented in this case, Martin's primary criticism of *Zummo* is its assertion that exposure to contradictory religions is

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[4] It is unnecessary for us to repeat *Zummo's* extensive analysis. Suffice it to say *Zummo* is exceedingly broad in its scope. It begins with the historical background of the issue, including religious freedom as considered by the founding fathers, parental authority over offspring, parental authority over childrearing as augmented by the right to religious freedom under the First Amendment, and post-divorce parental authority and religious freedom. *Zummo* goes on to discuss pre-divorce religious training agreements, it examined the children's pre-divorce religious training, whether it is constitutionally permissible to consider the interest of the children" spiritual stability or which parent is more "devout", the relevance of perceived differences in religions, the perceived probability of harmful effects from exposure to "inconsistent religions, and whether a parent may be directed to take children to religious school in furtherance of the religious indoctrination sought by the other parent. This court is fortunate to have *Zummo* on the books as a resource in this troubling area of the law.

[5] In a dissent, the third judge concluded the trial court properly considered the children's best interests and exercised sound discretion in ordering the father not take them to church. (*Zummo, supra*, 574 A.2d at p. 1158)

generally not harmful to children. (*Zummo, supra*, 574 A.2d at pp. 1156-1157.) Given the constitutional dimensions of the matter, it appears to this court *Zummo* wisely declines to speculate that such exposure is harmful, and instead, requires the party seeking the restriction the burden of demonstrating by competent evidence the belief or practice of the party to be restricted actually presents a substantial threat of harm to the child. (*Zummo*, *supra*, at pp. 1154-1155, 1157.)

3 *Mentry* has not been superseded by the RFRA.

Marsha argues California's *Mentry* standard has been superseded by the RFRA (42 U.S.C. § 2000bb et seq.), and this court should clarify the Act's impact upon *Mentry*.

Briefly, the Act states in relevant part at 42 United States Code section 2000bb-1: "(a)...¶Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.....¶(b)...¶Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — ¶ (1) is in furtherance of a compelling governmental interest; and ¶ (2) is the least restrictive means of furthering that compelling governmental interest." [6]

The Act, prohibiting the government from substantially burdening a person's exercise of religion unless the infringement is essential to furtherance of a compelling state interest, is easily reconciled with *Mentry*. *Mentry* requires a "clear affirmative showing that (the) religious activities will be harmful to the (child)" before the parent will be enjoined. (*Mentry, supra*, 142

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[6] The Act is retroactive, "appl(ying) to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." (42 U.S.C.§ 2000bb-3, subd. (a).)

Cal.App.3d at p. 266.) Obviously, the prevention of harm to the child, which was the concern of *Mentry*, is a compelling state interest. Therefore, the *Mentry* standard for burdening a parent's exercise of religion is consistent with the Act.

4. Trial court properly declined to enjoin Marsha because the record supports a finding of a lack of harm to the minor.

Marsha testified: She had never received any report the minor child was a discipline problem at any of the events he had attended at Calvary. She had never observed the minor crying upon picking him up from Sunday school, or from the Wednesday night activity. Nor were there any problems with the minor after his having attended camp. He had not been in any fights and she did not observe any bruises upon him.

This evidence supports the conclusion the minor is not being harmed by the religious activity in issue. Based on this state of the record, the trial court properly could find Martin had failed to meet his burden of making "a clear affirmative showing that these religious activities (are) harmful to the (child)." (*In re Marriage of Mentry, supra*, 142 Cal.App.3d at p. 266.) Accordingly, the trial court properly refused to enjoin Marsha from involving the minor in religious activity. [7]

5. Marsha's antenuptial written promise to raise her children in her spouse's faith is not legally enforceable.

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[7] Notwithstanding the above evidence, Martin contends the minor is being harmed by being raised simultaneously in two conflicting religions. To the extent Martin relies on matter outside the record, such as a postjudgment letter from wife's counsel discussing the minor's behavioral problems related to the religious conflict, it cannot be considered on this appeal. However, Martin is not precluded from making a new showing in the trial court based on a change of circumstances since the 1992 hearing.

Leaving aside the issue of harm to the minor, Martin contends Marsha is contractually bound by her written antenuptial Declaration of Faith to raise the minor in the Jewish religion. Martin's reliance on the contract is misplaced.

In *Zummo*, enforcement of such an agreement was refused. *Zummo* recognized enforcement of the agreement and of the trial court's order prohibiting the father from taking his children to "religious services contrary to the Jewish" faith would have entangled the court in issues such as "(w)hat constitutes a 'religious service?" and which services "are 'contrary' to the Jewish faith?" (*Zummo, supra*, 574 A.2d at p. 1146.)

Zummo also recognized enforcement would have "encroache(d) upon the fundamental right of individuals to question, to doubt, and to change their religious convictions, and to expose their children to their changed beliefs. The constitutional freedom to question, to doubt, and to change one's convictions, protected by the Free Exercise and establishment Clauses, is important for very pragmatic reasons. For most people religious development is a lifelong dynamic process even when they continue to adhere to the same religion, denomination, or sect. (Fn. Omitted.)...The First Amendment specifically preserves the essential religious freedom for individuals to grow, to shape, and to amend this important aspect of their lives, and the lives of their children. Religious freedom was recognized by our founding fathers to be inalienable. It remains so today. Thus, while we agree that a parent's religious freedom may yield to other compelling interests, we conclude that I may not be bargained away," (*Zummo*, supra, 574 A.2d at p. 1146-1148, last italics ours.)

We recognize the agreement in *Zummo* was oral, whereas here it is written. However, that is a distinction without a difference because the outcome in *Zummo* did not turn on a lack of a writing.

Zummo's various reasons for refusing to enforce the parties' agreement therein are compelling here. For example, the instant case amply illustrates the potential for judicial entanglement. As indicated, Martin concedes Marsha has the right "to expose" the minor to her religion but objects to the minor "being indoctrinated" in the Christian faith. Martin testified he would permit the minor to go to church with Marsha as an observer and even to sing hymns along with the rest of the congregation, but he would object to the minor's joining a children's choir group, or enrolling in a bible study group or in any education in the Christian faith. Given the fine and perhaps illusory line between exposure and indoctrination, improper judicial entanglement in religious matters would be inevitable if Martin's request were to be accommodated.

Further, in view of Marsha's inalienable First Amendment right to the free exercise of religion, which includes the right to change her religious beliefs and to share those beliefs with her offspring, her antenuptial commitment to raise her children in Martin's faith is not legally enforceable for that reason as well.

For these reasons, Martin's reliance on the antenuptial agreement, albeit written, to control the minor's religious upbringing is unavailing.

6. Martin's untimely appeal from the attorney fees bars consideration of those issues.

As indicated, martin's October 1, 1993 notice of appeal from the August 4, 1993 further judgment on reserved issues also specified the trial court's July 29, 1991 and November 5, 1992 orders for contributory attorney fees, which directed him to pay $10,000 and $12,000, respectively.

We look "to the substance of an order pendente lite rather than to chronology or to form" to determine whether the order is

directly appealable. (*In re Marriage of Skelly* (1976) 18 Cal.3d 365,368; accord *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959,963.) "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. (Citations)" "*In re Marriage of Skelly, supra*, 18 Cal.3d at p. 368.) Such a determination is substantially the same as a final judgment in an independent proceeding. (Ibid) Thus, a direct appeal lies from a pendente lite attorney fees order when nothing remains for judicial determination except the issue of compliance or noncompliance with its terms. (id., at pp. 368-370; *Askew v. Askew, supra*, 22 Cal.App.4th at p. 964, fn.37; *Kinoshita v. Horio, supra*, at p. 963.) [8]

"The law of this state does not allow, on appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken. (Citations.)" (*Woodman v. Ackerman* (1967) 249 Cal.App.2d 644,648.) Specifically, Code of Civil procedure section 906, pertaining to the powers of an appellate court, states in relevant part: "The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." Because Martin did not appeal from the immediately appealable pendente lite attorney fee orders of July 29, 1991 and November 5, 1992, those orders became final and binding upon him. Accordingly, the purported appeals from the attorney fee orders must be dismissed.[9]

---

[8] In recognizing the availability of a direct appeal from such an order, our Supreme Court in *In re Marriage of Skelley*, observed: "this court is not unmindful of the monumental workload of the Courts of Appeal. However, 90 years of judicial approval and recent legislative affirmation tell us judicial economy cannot be invoked to outweigh the right of appeal for those subject to an order tantamount to a final judgment." (*In re Marriage of Skelley, supra*, 18 Cal.3d at p.370.)

[9] In any event, Martin appears to have abandoned the merits of the attorney fees issue. The reply brief states: "There is no specific demand, as such, for return of (the attorney) fees. There is a demand for recognition that the unwarranted

7. Remaining issues not reached.

Martin's remaining arguments are without merit and any discussion of them is unnecessary.[10]

DISPOSITION

The further judgment on reserved issues is affirmed. The purported appeals from the attorney fees orders are dismissed. Marsha to recover costs on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

CROSKY, J.

KITCHING, J.

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application of those fees critically compromised (his) efforts at presenting his case."

[10] Martin's request the names of the parties be omitted from the opinion is denied in that this case does not meet the standards for nondisclosure. (See California Style Manual (3d ed. 1986) § 213, p. 146.) Also, Martin's request for family anonymity is complicated by the fact Martin is acting as his own counsel and has even authored a law review article covering the topic which he has cited to us.

APPENDIX 2

Second Appellate District, Division Three. No. B083168

S042363

IN THE SUPREME COURT OF CALIFORNIA

MARTIN M. WEISS, Appellant

v.

MARSHA N. WEISS, Respondent

Appellant's petition for review DENIED

SUPREME COURT
FILED
MAY 1 1996
Robert Wandruff Clerk
H. CRUZ
DEPUTY

Kennard
Acting Chief Justice

APPENDIX 3

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

FILED
JUL 29 1991
JAMES DEMPSEY, CLERK

IN RE THE MARRIAGE OF:
PETITIONER: MARTIN MEYER WEISS
and
RESPONDENT: MARSHA NADEEN WEISS

CASE NO. NWD 119 894
ATTORNEY ORDER AFTER HEARING ON
CONTESTED ISSUES OF SUPPORT AND ATTORNEY FEES

The above captioned matter came on regularly for hearing on June 26, 1991, in connection with the parties respective Order To Show Cause proceedings previously filed and bifurcated for hearing on the issues of support and attorney fees before Honorable Mina D. Fried, Judge Pro Tem, presiding. Petitioner present in court and represented by the law offices of Svenson and Garvin by Harold W. Svenson. Respondent present in court and represented by the law offices of Rehwald, Rameson and Lewis by Thomas Trent Lewis. The court having read and considered the declarations of the parties which were received into evidence by reference to the file as well as the offers of proof recited on the record, the direct testimony of the parties, the oral and written arguments of counsel

presented both in open court and in chambers, and good cause otherwise appearing, THE COURT ORDERS THAT:

1. Petitioner is ordered to pay the Respondent as and for temporary spousal support, the sum of Two Thousand Seven Hundred Sixty-Two dollars no cents ($2762.00) payable semi-monthly, one half on the first and one half on the fifteenth day of each month, commencing on July 1, 1991 and continuing thereafter until death of either party, the remarriage of the Respondent, or further order of court, whichever shall first occur.

2. As a full complete and final resolution of the issue of retroactive support, the court orders the Petitioner to pay directly to the Respondent, as and for temporary spousal support, the sum of Eight Thousand Two Hundred Eighty Six dollars no cents ($8,286.090) spousal support all due and payable in one lump sum on or before July 14, 1991.

3. The court makes the following findings with respect to spousal support as required by California Rule of Court 1274:

a. As to the Petitioner, the court finds his tax payer filing status is single with one (1) Federal Exemption. The court finds petitioner has the ability to earn gross monthly income of $11,474.00 per month calculated based on his ability to earn $53.00 per hour and the ability to work, although he is not presently working, 50 hours per week. The court finds Petitioner will take $300.00 per month in property tax deduction and $650.00 per month in charitable contributions. The court finds that after the support Petitioner will have an adjusted net income of $8,603.00 per month, which, when combined with the respondent's adjusted net income after support order of $22.00 per month, yields a combined adjusted net income of $8,625.00 per month. Based on

the court's order for support, petitioner will have 68% of the combined net income after support.

b. As to Respondent, the court finds respondent is presently unemployed, but has a prior work history and the present ability to earn $560.00 per month, which gross monthly income may be adjusted upward latter. The court finds Respondents tax payer status is head of Household with two (2) exemptions. The court awards the dependency exemption for the minor child to the Respondent. Based on the court's order for support, Respondent will have 32% of the combined adjusted net income after support.

4. Since both of the parties are currently residing at 6345 Daylight Drive, Agoura Hills, California (hereinafter "Daylight Drive Residence") and pursuant to California Rule of Court 1274, the court makes the following orders regarding the allocation of household expenses and expenses of the minor child:

a. Petitioner is solely responsible for the property taxes and homeowners insurance on the Daylight Drive residence.

b. Petitioner is ordered to pay 68% and Respondent is ordered to pay 32% of the customary utilities and gardener expenses at the Daylight Drive Residence.

c. Petitioner is ordered to pay 68% and Respondent is ordered to pay 32% of the following expenses:

(i) the monthly premium for health insurance covering Respondent and the minor child.
(ii) The uninsured medical and dental
(iii) The school tuition expenses of the minor child.

5. On the contested issue of attorney fees, the court orders Petitioner to pay directly to counsel for the Respondent, Thomas Trent Lewis at 5855 Topanga Cyn. Blvd. Ste 310,

Woodland Hiils, CA 91367, as a contributive share of attorneys fees and costs, with the court reserving jurisdiction over future fees and costs, the sum of ten Thousand Dollars ($10,000) payable in one lump sum on or before July 14, 1991. *Said contributive share of attorneys fees is an advance without prejudice to either party at the time of trial.*

6. Both parties were present in open court when this order was pronounced. This order is effective June 26, 1991. Both parties have the ability to comply with this order.

7. Except as modified, all other orders shall remain in full force and effect. *The court will determine the issue of attorneys fees at the time of trial.*

Approved as to form and content:

IT IS SO ORDERED,

DATED 7/29/91

/s/ Mina D. Fried
MINA D FRIED, Judge Pro Tem

(Italicized words hand written in by Honorable Mina Fried, Judge Pro-Tem, and initialed by her)

APPENDIX 4

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

HONORABLE MINA J FRIED, JUDGE
PRO TEM

In Re the marriage of
WEISS, MARTIN MEYER Petitioner
and
WEISS, MARSHA NADEEN Respondent

Counsel for Petitioner: Paula Kane
Counsel for Respondent: Thomas Trent Lewis

RULING ON THE SUBMITTED TRIAL ISSUE OF ATTORNEY FEES AND COST

As and for Petitioner's additional contributive share of respondent's attorney fees and costs, the Petitioner is ordered to pay directly to Respondent's counsel, Thomas Trent Lewis, the total sum of $12,000.00. Said award is payable $500. Per month, due on the 1st of each month, commencing on January 1, 1993. If any one payment is more than 30 days overdue, the entire balance owing accelerates and becomes all due and payable.

Counsel of record are notified of this order by certified copies of this minute order deposited in the U.S. Mail this date addressed as follows:

Paula Kane, Esq.
11100 Santa Monica Blvd. Ste. 900
Los Angeles, CA 90025

Thomas Trent Lewis, Esq.
5855 Topanga Cyn. Blvd. Ste 400
Woodland Hills, CA 91367

MINUTES ENTERED 11-5-92
COUNTY CLERK

APPENDIX 5

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
LOS ANGELES SUPERIOR COURT
AUG 4, 1993

IN RE THE MARRIAGE OF:
PETITIONER: MARTIN MEYER WEISS
and
RESPONDENT: MARSHA NADEEN WEISS

CASE NO. NWD 119 984

FURTHER JUDGMENT ON RESERVED ISSUE OF CUSTODY

The trial on the limited issue of custody came on regularly for hearing on August 24-28, 1992, in Department NW "K", the Honorable Mina Fried, Judge pro Tem, presiding. Petitioner, MARTIN MEYER WEISS ("Petitioner"), appeared in person and by his attorney, PAULA KANE, ESQ; Respondent, MARSHA NADEEN WEISS ("Respondent"). Appeared in person and by her attorney, THOMAS TRENT LEWID, ESQ.

Evidence having been introduced and the cause having been fully argued and submitted to the court for decision, IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:

1. PHYSICAL CUSTODY

1.1 Minor Child

The parties are awarded joint physical custody of the minor child, MATTHEW, a son born February 14, 1985

1.2 Regular Child Custody Schedule

Each party is awarded equal time with MATTHEW pursuant to the following schedule:

1.2.1 MATTHEW is to be with Respondent every Monday and Tuesday, and on alternate weekends from Friday after school until Monday morning, commencing Friday, August 28, and continuing on alternate weekends thereafter.

1.2.1 MATTHEW shall be with Petitioner every Wednesday and Thursday, and on alternate weekends from Friday after school until Monday morning, commencing Friday, September 4, and continuing on alternate weekends thereafter.

1.2.2 Each parent's custodial time shall begin at the time the child is dropped off at school or at the other parent's residence by 9:00 a.m., if there is no school. Each party is responsible for any day care for the child or for any care for the child if the child cannot go to school, or has to be taken home from school, on the days that he/she is awarded physical custody pursuant to the schedule herein.

1.3 Religious Holidays Awarded to Petitioner

Petitioner is awarded the following religious holidays with the minor child:

1.3.1 the first and second day of Passover

1.3.2 Yom Kippur

1.3.3 Rosh Hashanah

1.4 Respondent's Religious Holidays

Respondent is awarded the following religious holidays with the minor child:

1.4.1 Purim

1.4.2 the third night of Passover. The award of the Purim and Passover Holiday is conditioned upon Respondent taking the child to a planned synagogue Purim or Passover

1.4.3 service/celebration at either a reform, conservative, orthodox or sephardic temple.
1.4.4 Christmas Eve and Christmas Day; and
1.4.5 Easter Sunday

1.5 Summer Vacation Period
Each party is awarded up to three consecutive weeks of vacation with the minor child each year, with the petitioner to have priority for vacation during the summer school holiday and respondent to have priority for vacation during the winter/Christmas school holidays.

1.6 Other Holidays/Significant Days
1.7 Holidays to Petitioner
1.7.1 Petitioner is awarded custody of the minor child:
1.7.1.1 Father's Day
1.7.1.2 Petitioner's birthday

1.8 Holidays to respondent
1.8.1 Respondent is awarded custody of the minor child:
1.8.1.1 Mother's Day
1.8.1.2 Respondent's Birthday

1.9 Minor Child's Birthday

Petitioner is awarded physical custody of the minor child on the minor child's birthday in odd numbered years, commencing 1991. Respondent is awarded physical custody of the minor child on the minor child's birthday in even numbered years, commencing 1992.

2. LEGAL CUSTODY

2.1 Joint Legal Custody
Petitioner and Respondent are awarded joint legal custody of MATTHEW and they are to confer and mutually agree as to any

legal, education, psychological, or psychiatric decisions involving the minor child.

2.2 Enrollment in Religious Studies

Petitioner may enroll MATTHEW in Hebrew Jewish studies program, up to two times per week, regardless of MATTHEW's custody schedule. This religious training program shall have priority over any other schedule or activity. Except as provided herein above, nothing in this Order is deemed to prevent either party from enrolling the child in or having the child participate in other religious programs or activities during their respective custodial time.

2.3 Other Extra Curricular Activities

Subject to the priority for religious after school program above, each parent may enroll the child in one extra curricular activity on his or her other day of custodial time, which shall not interfere with the other parent's custodial time unless by mutual agreement.

2.4 Residence For Purpose of School Enrollment

For purpose of school enrollment, MATTHEW's residence is Petitioner's residence. MATTHEW will be enrolled in the public school in the district of Petitioner's residence. MATTHEW will continue to be enrolled in public school unless both parties mutually agree in writing as to another public school in another area or a private school.

2.5 Restraint on Changing Residence

The child's residence shall not be changed from the immediate Agoura area without the written consent of both parties or further order of the Court. Neither parent shall remove the child from the State of California without the written consent of both parties, or further order of Court, except that either parent may take the child out of the State of California for a period of time not to exceed three weeks per year, provided that the other parent is given

advance written confirmation as to the dates of travel and the child's address and telephone number while out of the country.

2.6 Therapy For Minor Child
Pursuant t the stipulation of the parties, the minor child is to be enrolled in psychotherapy with a licensed therapist mutually selected by both parties. If the parties cannot agree to a mutual therapist, the Court shall retain jurisdiction to appoint a therapist.

2.7 Medical, Dental and School Records
Both parties shall be listed on the minor child's medical, dental and school records for purposes of notification.

2.8 Reservation of Jurisdiction
The Court reserves jurisdiction over the other Holidays tp be allocated between the parties.

APPROVED AS CONFORMING TO THE ORDER OF COURT

Dated 7/7/93

_____
Paula Kane, Attorney for Petitioner

_____
Thomas Trent Lewis, Attorney for Respondent

IT IS SO ORDERED

/s/ MINA D FRIED
MINA D FRIED
JUDGE OF THE SUPERIOR COURT
dated Aug 4, 1993

APPENDIX 6

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
JAN. 7 1994

Marriage of
Petitioner: MARTIN MEYER WEISS
and
Respondent: MARSHA NADEEN WEISS

CASE NO. NWD 119 894
FURTHER ORDER ON JUDGMENT ON RESERVED ISSUES

The court previously bifurcated this matter as to the Status of the Marriage and entered a Judgment of Dissolution of Marriage on August 25, 1992. Subsequently, the court conducted a trial on the bifurcated issue of custody and visitation which was reduced to a Further Judgment on Reserved Issues filed on Aug.4, 1993. The court set the matter for trial on the Further Reserved Issues of spousal and child support, division of property and attorneys fees and costs. The parties appeared for trial on January 7, 1994 and January 10, 1994....., IT IS FURTHER ORDERED ADJUDGED AND DECREED AS FOLLOWS: .....

5. ATTORNEY FEES.

As and for an additional share of attorneys fees, Petitioner is ordered to pay Respondent's attorney the sum of $5,000, payable at the rate of $1,000 per month payable on the first of each month commencing February 1, 1994 and terminating with the payment due June 1, 1994. This attorney fee order is in addition to any prior attorney fee order(s) made by this court.

....GOOD CAUSE APPEARING IT IS SO ORDERED

DATED JAN 10, 1994
DAVID R. NISSAL
JUDGE OF THE SUPERIOR COURT

APPENDIX 7

The Graduate School and University Center
of the City University of New York

July 16, 1990

Dear Dr. Weiss,

This is in response to your recent inquiry about my research on children raised in mixed marriages, published under the title, "Children of Intermarriage: A Study in Patterns of Identification and Family Life," by the American Jewish Committee in New York, in 1983.

The study is based on 117 children-of-intermarried couples, ranging in age from 16-42 (i.e. children in the sense of progeny not of childhood age). All were from intact families to eliminate any possible effects of divorce.

The principal objective of the study was to discover the relationship between being raised in an intermarriage and later ethnic-religious identification. Only secondarily, and to a very limited extent did the study attempt to evaluate any of the possible emotional correlates of being raised in an intermarriage.

We had no standardized measure of self-esteem or emotional well-being built into the study. Our main interest in this area was whether or not respondents showed evidence of emotional marginality, as explained in the study, vis-à-vis their parents and extended families.

These and other limitations make the study virtually inapplicable to an understanding of the particular situation of a child who is thrust by divorce into being raised in two religions.

I hope you will find these comments pertinent to your purposes. As I indicated by telephone, I stand ready to be of further assistance should you find it useful.

Sincerely,

/s/ Egon Mayer
Egon Mayer, Ph.D.
Senior Research Fellow

APPENDIX 8

February 7, 1994

Re: Marriage of Weiss

Dear Dr. Weiss:

You have sent me a copy of a Notice of appeal that was purportedly filed by you although it does not bear a Court filing date, but it was signed by you on September 30, 1993.

In that Notice of appeal you request that the Court review the Order for Contributory attorneys fees in the above referenced matter. As recited in your Notice of Appeal the contributory attorney fees were entered on July 29, 1991 and November 5, 1992.

A Notice of appeal must be filed within sixty days of the entry of any Order. In each case, you have clearly exceeded the sixty day period for the filing of a Notice of appeal since your Appeal Notice presumably was not filed before September 30, 1993. Accordingly, I am requesting that you stipulate to dismiss these Appeals because they are not timely.

Furthermore, there is no Statement of Decision rendered in this matter. Because there is no Statement of Decision rendered, it is my opinion that there is no basis for the Court to review the custody order that it made and entered on august 4, 1993. Since there is no way that the Court of Appeals will be able to review Mina Fried's Decision without a Statement of Decision I am requesting that you stipulate to dismiss your Appeal.

If you are unwilling to dismiss your Appeal, then I will be filing a Motion to Dismiss your Appeal as to the fee orders. With it I will also be filing a Motion in the Superior Court for further attorney fees for having to defend a frivolous appeal. I recognize that you are acting in pro Per in this setting, but I can't believe that you wouldn't be seeking the assistance of counsel with respect to how to proceed. Please give careful consideration to proceeding with this Appeal any further as I'm confident that the Court will vindicate Marsha both with respect to the merits of your appeal and the costs associated with defending it. Please govern yourself accordingly.

Sincerely,
/s/ Thomas Trent Lewis
Thomas Trent Lewis
Certified Family Law Specialist